* **HIGH COURT OF DELHI : NEW DELHI**

\+ **OMP No. 361/2001**

Judgment reserved on: March 21, 2007
% Judgment delivered on: May 23, 2007

M/s. Taipack Limited & Others ..... Petitioners
Through: Mr. Pradeep Dewan and
Mr. Sumit Goyal, Advocates

versus

Ram Kishore Nagar Mal ..... Respondents
Through: Mr. Tiger Singh with
Mr. Peeyosh Kalra, Advocates

CORAM
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J.

INTRODUCTION AND BACKGROUND FACTS.

1. This petition has been filed by M/s Taipack Ltd. under Section 34 of the Arbitration and Conciliation Act 1996 (The Act) challenging the award dated 14.8.2001 made by sole arbitrator Shri Krishan Lal Aneja in claim No. 2000-01 titled “M/s Ram Kishor Nagar Mal vs. M/s. Taipack Ltd.”

2. The impugned award has been challenged on two broad grounds:

> 1. The arbitrator had no jurisdiction to enter upon the reference as there was no arbitration agreement between the parties under which the disputes could have been arbitrated upon.
> 2. The award is in violation of the public policy of India, as it is based on incorrect interpretation and application of laws in force in India. It violates provisions of The Limitation Act, 1963 and Sick Industrial Companies (Special Provisions) Act, 1985 and The Arbitration and Conciliation Act, 1996.

3. Brief facts, as germane to the controversy are that the petitioner had placed an order for supply of BOPP films upon the respondent. On the back of the said purchase order dated 13.2.1997, were printed some terms and conditions upon which the petitioner company made its aforesaid offer.

4. Clauses 10 and 11 thereof read as follows:-

> “10. Any terms stipulated in seller's confirmation or any other documents in addition or contradiction to what mentioned in this order will not be acceptable to us unless specifically agreed to in writing”.
> “11. Any dispute arising out of this contract shall be subject to the jurisdiction of courts in Delhi and the supplier expressly agrees to submit to such jurisdiction.”

5. Respondent No.1 supplied the goods to the petitioner as per the order. However, a dispute arose regarding the payment for these goods.

6. The invoices and delivery documents raised by the Respondent no.1, and signed and accepted by the petitioners agents also

contained on its reverse certain terms and conditions of the respondent. Condition 4 of the said invoice as filed on record reads as follows:-

> "In case of any dispute the judgment of the Tribunal of any other authority appointed by the Paper Merchants Asociation (Regd.) Delhi will be final & binding."

7. The Respondent, on 3.2.1999 and 27.9.1999 got issued legal notices to the petitioner demanding as principal liability, besides interest etc. a sum of Rs. 13,68,076.08 as balance/outstanding on account of the goods supplied to the petitioner. Vide the said notice the Respondent No.1 also called upon the petitioner to issue the relevant 'C' form for the value of the goods supplied, or pay a sum of Rs.7,05,584/- towards sales tax liability.

8. The petitioner refuted the claim made by the Respondent vide its replies dated 5.4.1999 and 25.10.1999. However, 'C' forms were issued to the respondent for a total value of Rs.6,25,250.50 on 6.1.2000.

9. Thereafter, on 20.1.2001 a notice of the claim filed by the respondent before the Arbitrator appointed by Paper Merchants Association was received by the Petitioner.

10. The Petitioner entered appearance and raised its objections, as aforesaid, before the Arbitrator. The same, however, came to be rejected by the impugned award, and the arbitrator proceeded to allow the Respondent's claim to the extent of Rs.24,89,898/- along

with interest at the rate of 24% per annum from the date of the award till realisation.

11. The Paper Merchants Association (Regd.) is stated to be a registered association, and its "*Constitution and Regulations*" as amended upto 30.11.2000 has been filed on record by the Respondent. Regulation XXX thereof is relied upon by the respondents, and the same, in so far as it is relevant reads as follows:

> **"XXX. Rules for Arbitration Cases framed by the Executive Committee under Rule XVI (15) of the Constitution & Regulation.**
> 1. In regard to the Aims and Objects of the Paper Merchants Association (Regd.) Delhi Rule II Sub Clause (13) the disputes including disputes of non-payment between member to member or member to an outsider shall be decided by the Arbitrator/Arbitrators appointed by the Association. The Award given by the Arbitrator/Arbitrators shall be binding on both the parties. The disputes including disputes of nonpayment between member to member and member to an outsider shall be filled in the Association as per above reference.
> **In case of any dispute including dispute of nonpayment in respect to this bill the same shall be referred to the "Paper Merchants Association (Regd.) Delhi" for sole arbitration and the judgment given by the Arbitrator/Arbitrators appointed by the Executive Committee shall be final and binding on both the parties.**
> 2. For an outsider the above term of Arbitration will be printed or stamped on original and duplicate sale invoices and both the parties will be bound to this term.
> Even if the term of Arbitration is not printed on the Sale invoices and both the parties appear and participate in the Arbitration proceedings,

it will be presumed that the parties have accepted the Arbitration."

Discussion and Decision:

Issue Regarding Existence of an Arbitration Agreement:

12. I have gone through the award and heard learned counsel for the Petitioner. Learned counsel for the respondent did not address oral arguments despite opportunity, and on 21st March, 2007 sought three days time to file written submissions. However, no written submissions have been filed by the Respondents.

13. In my opinion, the submission of the Petitioner that there was no existing agreement between the parties to refer the disputes arising out of their commercial relationship to Arbitration, is well founded. The arbitrator has rejected the objection as to non-existence of an arbitration agreement on the basis of the said clause 4 printed on the reverse of the invoices etc. raised by the Respondent. The arbitrator held that since the Petitioner herein received the goods without any protest and prejudice, or without intimating any contrary intention through a letter or notice, it was not open for it to resile from the conditions printed on the bills & invoices of the Respondent herein. As per the said clause, the matter was referable to Paper Merchants Association, Chawri Bazaar, for arbitration. Consequently, according to the learned Arbitrator, an arbitration agreement existed between the parties in relation to their commercial transactions and he had jurisdiction to arbitrate the same.

14. The issue that arises for consideration is whether there was an existing and enforceable arbitration agreement between the parties, to refer their disputes in relation to the contract in question to Arbitration by the Paper Merchants Association (Regd.).

15. Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement. An arbitration agreement has necessarily to be in writing. It may be contained, inter alia, in a document signed by the parties, or in an exchange of letters, telex, telegrams or any other means of telecommunication, which provide a record of the agreement.

16. In the present case, there is no arbitration agreement which could be said to be '*contained in a document signed by the parties*'. [See section 7(4)(a) of the Act]. Therefore, one has to ascertain whether there is an arbitration agreement which could be said to be contained in '*exchange of letters, telex, telegram or any other means of telecommunication, which provide a record of the agreement*'. An "*arbitration agreement*" is a species of the genus, that is "Agreement". There has to be, first and foremost an agreement. For the existence of an agreement there has to be "*consensus ad idem*"

between the parties, i.e., they should agree to the same thing in the same sense.

17. In the present case, the Petitioner herein made his offer when it placed the purchase order dated 13.2.1997 upon the Respondent which, inter-alia, contained clauses 10 and 11 as aforesaid. Clause 10, specifically made any other terms or conditions, contained in any document of the respondents that were in addition to, or in contradiction to those contained therein, inapplicable to the contract unless they were specifically agreed to by the petitioner in writing. Clause 11 subjected all disputes to jurisdiction of Delhi Courts. The respondent acted on this offer by effecting supplies of the goods, and at the same time raised an invoice dated 6.3.1997 for Rs.1,49,866.17 which contained condition No.4 as extracted above.

18. What is the legal effect of the aforesaid conduct of the Respondent? In my view, when the Respondent supplied the goods in compliance of the Purchase Order, it accepted the terms and conditions stipulated therein. The mere printing of condition No. 4 on the reverse of the invoice was, at the highest, an offer made by the Respondent to the Petitioner. Unless the said offer was accepted by the Petitioner, it could not result in a binding and enforceable contract. The inclusion of terms and conditions at the back of the invoice, unilaterally issued by the Respondent while effecting delivery of the goods in terms of the Petitioner's purchase order, would not bind the

Petitioner. The purchase order itself made it clear that the Petitioner did not intend to refer its disputes to arbitration in respect of the resulting transaction arising out of the said purchase order. Arbitration was clearly contra indicated when the Petitioner's purchase order itself stated that "*Any dispute arising out of this contract shall be subject to the jurisdiction of Courts in Delhi*" The Respondent was well aware that the Petitioner had shunned arbitration, yet the Respondent acted in furtherance of the said purchase order by effecting supplies.

19. On the other hand, there were hardly any further steps required to be taken by the Petitioner when the Respondent effected supplies and sent its invoice. The supplies having been effected, there was no other step required to be taken by the Petitioner, by which it could be inferred that the Petitioner consented to the conditions contained on the reverse of the Respondents invoice. The making of the payment by the Petitioner for the supplies effected by the Respondent cannot be considered to be a step taken by the Petitioner to indicate its acceptance of the conditions mentioned by the Respondents on the reverse of the invoice. This is so, because the Petitioner was, in any case, obliged to make payments for the supplies received by it in accordance with its purchase order.

20. The signature by the petitioners agent on the respondents copy of the invoice cannot tantamount to acceptance of the respondents so called offer for arbitration. The signatures in such a situation were

evidently an acknowledgment of receipt of the goods and nothing more. There is another aspect of the so- called Arbitration Agreement contained in condition No.4 of the Respondents invoice. The said condition in the invoice firstly does not use the expression 'arbitration' or 'arbitrator'. Secondly, the Respondent does not even make a reference to the "*Constitution and Regulations*" of the Paper Merchants Association (Regd.), Delhi. Consequently, it is difficult to accept that the Petitioner ever became aware of, or agreed to refer its dispute with the Respondent and relation to the contract in question to arbitration by the Paper Merchants Association (Regd.), Delhi. The condition No. 4 appears to be incomplete and rather vague. Pertinently, Regulation XXX of the Paper Merchants Association states that the clause, above clause No. 2 in bold words, has to be printed by the Merchant on its invoice, for it to bind the outsider. However, what is printed by the Respondent on its invoice as condition No. 4 is nowhere close to the boldly printed text in Regulation XXX. It also appears that the arbitration contemplated in Regulation XXX is in respect of disputes of non-payment "*between member to member or member to outsider*". It is not in respect of disputes of non-payment from an outsider and a member, which is the case in hand. In response to the invoice sent by the Respondent, with the condition No.4 as aforesaid, there was no exchange of letters, telegrams or any other means of telecommunication in writing from the side of the Petitioner

to the Respondent, where from the consent of the Petitioner to the conditions contained on the reverse of the invoice could be inferred.

21. For the aforesaid reasons I find that there was in fact no arbitration agreement between the parties and that the arbitrator appointed by the Paper Merchants Association (Regd.), Delhi had no jurisdiction to adjudicate the disputes between the parties in relation to the contract in question. The arbitrator has completely misdirected himself in dealing with the aforesaid specific objection as to his jurisdiction.

Issue of Limitation:

22. The other contention of the petitioner is that the claim of the Respondent was time barred and the award is thus, contrary to the provisions of the Limitation Act. The Arbitrator, as it appears from para 10 of the award, proceeded on the assumption that Limitation would have to be calculated from the date the transaction was completed, i.e., when the Central Sales Tax, 'C' Form, was delivered to the Respondent by the Petitioner i.e. on 16.1.2000. In the alternative, the Arbitrator also treated the 'C' Form as an acknowledgment and held the claim as within limitation.

23. The Petitioner assails the aforesaid conclusion on the ground that suits for recovery of price of goods sold under a contract are governed by Articles 14 & 15 of the Schedule to the Limitation Act which prescribes the starting point of limitation as date on which the

goods are delivered where no fixed period of credit is agreed upon, or where it is so fixed, on expiry of the said term respectively. The Purchase Order dated 13.2.1997 clearly stipulates that the payment was to be made in 90 days of the date of dispatch of goods. There is no averment in the claim petition that any goods were supplied beyond 31.7.1997 (the principal amount claimed before the Arbitrator was the total claimed to be outstanding as on the said date).

24. Thus, time began to run in this case not later than 31-7-97 (or 90 days thereafter at the latest) which date was not denied by the Respondent No.1 in his rejoinder filed before the Arbitrator. Proceedings, if any, ought to have been initiated before the expiry of three years from that date. However, the Arbitration commenced in January, 2001. The giving of `C' Form by the petitioner on 16-1-2000 does not have the effect of postponing the due date of payment under the contract. Therefore, unless the Respondent makes out a case of extension of limitation under the provisions of the Limitation Act, the proceedings were clearly barred by time.

25. The question is, can the said form 'C' given by the Petitioner to the Respondent on 16.1.2000 be considered to be an acknowledgment? The Respondent contended that the submission of 'C' form amounts to an admission of the jural relation, and would in law amount to an acknowledgment of liability within the meaning of Section 18 of the Limitation Act. Counsel for the Petitioner refuted this

claim by contending that the 'C' form is, at best an admission of a transaction that took place in the past, but not of any present subsisting liability to pay. He contends that it cannot even be treated as an acknowledgment of a jural relation of a debtor and creditor.

26. In order to buttress this argument Petitioner placed reliance upon ***Shapoor Freeloom Mazda v. Durga Prasad Chamania & Others,*** AIR 1961 SC 1236; ***State of Haryana v. Bharat Steel Tubes Ltd.*** AIR 1996 Delhi 198; ***K. Ganpathy v. Vaidyalingam*** AIR 1971 Madras 425; and ***Union of India owning Southern Railway represented by General Manager, Madras, vs. Sayadev Beedi Co. & Another,*** AIR 1970 Mad 108.

27. In ***Shapoor Freedom*** (supra), the Apex Court while sounding a word of caution in the manner in which the words used in a document ought to be construed in such cases, held that words contained in each document must be construed in the context in which they were used and reference to judicial precedents may not be of much help.

28. However, the Court laid down the basic requirements that need be fulfilled for a document to constitute a valid acknowledgment within the meaning of S. 19 of the 1908, Act which is in pari materia with Section 18 of the Limitation Act, 1963. The Court held:

> "(6) It is thus clear that acknowledgement as prescribed by S. 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgement of the liability in respect of the right in question; it need not be accompanied by a promise to pay either

expressly or even by implication. ***The statement on which a plea of acknowledge is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words.*** Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer ***that the person making the admission intended to refer to a subsisting liability as at the date of the statement.*** In construing words used in the statements made in writing on which a plea of acknowledgement rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. ***Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning.*** Broadly stated that is the effect of the relevant provisions contained in S.19, and there is really no substantial difference between the parties as to the true legal position in this matter. (emphasis supplied)

29. In ***Valliamma Champaka Pillai v. Sivathanu Pillai & Others*** (1979) SCC 429 it was held that

> "*Under Section 18 of Limitation Act, 1908, one of the essential requirements for a valid 'acknowledgement' is that the writing concerned must contain an admission of a 'subsisting liability'. A mere admission of the past liability is not sufficient to constitute such an 'acknowledgement'. Hence a mere recital in a document as to the existence of a past liability, coupled with a statement of its discharge, does not constitute an 'acknowledgement' within this Section.*"

30. This Court in ***R.K.Chemical (M/s) vs. M/s. Kohinoor Paints Faridabad Pvt. Ltd. (P) Ltd. & Anr***., 2005 II AD (Delhi) 133, held that an auditors report signed on 27th November 1996 which reflected a debt existing in the accounting period 1995-96 (1.4.1995 to 31.3.1996) did not constitute acknowledgment of the debt as the said report merely affirmed the state of affairs prevailing as on 31.3.2006 and cannot be treated as acknowledging the position existing on the date of the report as well, i.e., 27th November 1996. For even if the position of debtors or creditors had undergone a change between April to November 1996, the same would not have found place in the said report.

31. Now can it be said that the 'C' Form supplied by the Petitioner herein constitutes acknowledgment of debt owed to the Respondent No.1 so as to give a fresh lease to the commencement of Limitation? The answer is plainly in the negative for the following reasons:

32. Firstly, there is no acknowledgement of a present and subsisting liability. The said form can at the most be treated as an

acknowledgement of the goods received under the contract of supply of goods and the price fixed to be paid for them. Whether or not payments were effected thereafter, or any amount remains due or outstanding cannot be inferred from the said 'C' form in the facts and circumstances of this case. Secondly, no intention to acknowledge a liability can be inferred from the contents of the said 'C' form. Thirdly, one cannot establish a jural relation of debtor and creditor from the contents of the said 'C' form. Thus, the essential requirements for a writing to constitute acknowledgment are missing from this document. (also see ***Hansa Industries (P) Limited Vs. M/s. MMTC Ltd.,*** 2004 VI AD (Delhi) 222).

33. Thus, the Arbitrator clearly erred in treating 16.1.2000 as the date of commencement of limitation. In view of the provisions contained in The Limitation Act, and the authorities cited, I find no force in the contention of the Respondent that the claim before the Arbitrator was within the period of Limitation. The said 'C' Form does not constitute an acknowledgment within the meaning of Section 18 of the Limitation Act and the Arbitrator misapplied the law on this aspect as well.

34. I, therefore, set aside the impugned award as being contrary to Public Policy of India.

VIPIN SANGHI
JUDGE

May 23, 2007
Babbar